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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

22 CR 305 (JMF)

5 NATHANIEL CHASTAIN,

6 Trial

7 Defendant.

8 -----x

9 New York, N.Y.  
May 3, 2023  
10 9:00 a.m.

11 Before:

12 HON. JESSE M. FURMAN,

13 District Judge

14 APPEARANCES

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Southern District of New York

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(Trial resumed; in open court; jury not present)

THE COURT: Good morning. Welcome back.

So this note has confounded me a little bit. I gave you guys three different versions, which have slightly different approaches to things. Let me explain a little bit of my thinking.

First, I think, to the extent that the defense submission focuses on the point in time at which the contract was signed, I think that's just not the proper inquiry here. The inquiry focuses on the nature of the information at the time that Mr. Finzer and Mr. Chastain signed their agreement. That information didn't exist, it wasn't even in contemplation, as far as I can tell, and, in that sense, it bears on the company's understanding of what kinds of information are confidential, but it doesn't answer the question of whether that particular information was confidential. So, in that regard, I think it's quite clear that it's not limited to the counterparties and signatories to the contract.

That's one of the many reasons that I don't plan to answer the question with just a simple "no."

Second, I think the government's point about referencing the other *Mahaffy* factors is well taken, but I'm inclined to do it in a more neutral fashion; that is to say, as you saw in a second paragraph, before referencing Mr. Finzer.

My concern about the government's proposal was that it

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1 was akin to sort of marshaling the government's evidence in  
2 some respects, and I think it makes sense to be more neutral  
3 about that.

4 I think the thorny issue here is whether, and to what  
5 extent, the jury can consider Mr. Chastain's views and conduct  
6 with respect to the question of whether the information is  
7 confidential. And I think, upon reflection, I'm less sure than  
8 I was yesterday when I think I suggested that his views were  
9 not relevant to that question.

10 One version I gave you - I think it is version 1 -  
11 does instruct the jury that his views are not relevant and  
12 adopts a variation of the defense proposal on that score.

13 The second version, I think, is sort of more silent  
14 and doesn't really answer the question at all, and may kick the  
15 can down the road, in the sense that the jury may come back and  
16 say, okay, but what about Mr. Chastain's views on the matter,  
17 can we consider those?

18 And the third provides a little bit more guidance on  
19 that in the sense that it does say that they can consider how  
20 the defendant and other employees at the company treated the  
21 information.

22 A couple further reflections:

23 The pretrial litigation regarding the questions that  
24 could be asked of Ms. Phan, for example, certainly looms large  
25 here. I looked back at it, and I have a couple of

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1 observations:

2 One is, it really was about the meaning and clarity of  
3 the contract and of the rules. It wasn't about the nature of  
4 the information. I don't think the government sought, and I  
5 don't think I ruled, that questions couldn't be asked of, say,  
6 Mr. Viau, who testified, or Ms. Phan, had she testified, of the  
7 nature of, was the information treated as confidential – did  
8 you consider it confidential, those sorts of questions. And,  
9 surely, if they were to testify that nobody treated it as  
10 confidential because we all talked about it openly out of the  
11 office, tweeted about it, emailed it to friends, et cetera,  
12 that would obviously be relevant and admissible.

13 Relatedly, I was thinking about, take a hypothetical  
14 case where Mr. Chastain had a right-hand man, an assistant, who  
15 basically was privy to all of the information that he was, and  
16 imagine that it's that person who engaged in the alleged  
17 conduct here and he was charged with the crimes that  
18 Mr. Chastain is charged with here. Surely, in that case, the  
19 government could put Mr. Chastain on the stand and have  
20 Mr. Chastain testify to the effect that the information was  
21 considered and treated confidential – like, I considered it and  
22 treated it as confidential, we didn't share it outside the  
23 company, you know, we didn't share it with other employees, the  
24 reason it was confidential was we wanted it to be a surprise,  
25 et cetera, et cetera – and if that's true, in that hypothetical

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1 case, it's just not clear to me how this case would be  
2 different in terms of the relevance of Mr. Chastain's views on  
3 those issues.

4 I guess the last thing I would say is the briefing  
5 didn't really focus -- I don't think at the time that I made  
6 those rulings I had a particularly vivid understanding of just  
7 how small the company was at the relevant time and where  
8 Ms. Phan was, or where Mr. Chastain was, for that matter, in  
9 the pecking order. There's an argument to be made, again,  
10 taking the hypothetical case that I just described --  
11 Mr. Chastain was head of product, arguably one of the top five  
12 employees at the company -- there's an argument to be made that  
13 his views were binding on the company and, in that regard,  
14 imputable to the company.

15 So I think part of the trick here is, what does it  
16 mean for a company to consider something? Because companies  
17 don't have thoughts; they have thoughts, through people. And  
18 the relevant question here, which I don't think I fully thought  
19 through pretrial, is whose thoughts are relevant to that  
20 question. And I think that's a little bit of what the question  
21 that the jury has posed is getting at.

22 That's a long windup, with a lot of thoughts, but as  
23 you can see, I've been spending a bunch of time thinking about  
24 this. Go at it.

25 Mr. Miller?

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1 MR. MILLER: Thank you, Judge.

2 A number of things with the Court's indulgence.

3 THE COURT: Just move the microphone closer.

4 MR. MILLER: Thank you. I seem to have been messing  
5 that up throughout trial. My apologies.

6 First, understood as to your Honor's ruling on the  
7 fact you don't agree that the answer should be no. We still  
8 think the answer should be no. The question was phrased in a  
9 very distinct manner, and it's talking about whether what is  
10 considered --

11 THE COURT: Mr. Miller, you've preserved that.

12 MR. MILLER: Understood.

13 THE COURT: You've certainly preserved that position.  
14 Go ahead.

15 MR. MILLER: Thank you, Judge.

16 But there are a number of points to be made. Just  
17 looking at the three versions, we think that, with the  
18 exception of listing out the *Mahaffy* factors, which I'll get to  
19 in a second, we think version 1 is the most accurate statement  
20 of the law. I'll address specifically some of your Honor's  
21 thoughts on this.

22 First, Mr. Chastain's views as to whether the  
23 information was confidential, with all due respect, is not  
24 germane to element 1. Mr. Finzer, as chief executive officer,  
25 was the authorized representative of the company to act on

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1     behalf of the company. And, obviously, in our letter last  
2     night, we laid out the law, both from Delaware and from  
3     California, since there was a choice-of-law provision – as well  
4     as New York – that talks about who acts on behalf of the  
5     company, who speaks on behalf of the company; it's the  
6     authorized officers and directors. It's not some random  
7     employee, it's not necessarily even Mr. Chastain, right? It's  
8     the CEO, the chief executive officer, as the authorized  
9     representative of the company.

10           And, in this circumstance, it is relevant that he  
11     signed the agreement, considering especially that the  
12     government's case relied on having the founders talk about the  
13     agreement and its interpretation of it.

14           So, ultimately, the question is whether or not, of  
15     course, the company considered that information confidential.  
16     That's what the jury is asking. And Mr. Finzer is the  
17     authorized officer, under Delaware and California, and New York  
18     law, is the one who speaks on behalf of OpenSea.  
19     Mr. Chastain's views on whether the information was considered  
20     and treated confidential, with all due respect, is irrelevant  
21     for element 1. Obviously, his intent and views go to element  
22     2, but that's not what the jury is talking about.

23           THE COURT: I'm not sure, under agency law, that's  
24     accurate. Surely, in another kind of case or in another  
25     setting, the actions of an employee within the scope of his

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1 employment are imputable to the company and can bind the  
2 company.

3           The conduct here is alleged to be ultra vires, not the  
4 scope of his employment. That's different. But take  
5 Defendant's Exhibits 1, 3, 6, whatever those numbers were.  
6 Certainly the government's argument is that Mr. Chastain was  
7 sharing plans of the company for a business purpose and,  
8 therefore, that was not a violation of the agreement and within  
9 the scope of his employment. If that's accurate – and I'm not  
10 opining on that – then surely that information is not  
11 confidential because it was not treated as, or considered by,  
12 Mr. Chastain as confidential. And it may be that Mr. Finzer is  
13 not even aware of that information. In other words, there's  
14 information that can qualify as confidential that the CEO is  
15 not aware of. He's not aware of all the information in the  
16 company.

17           So the way in which information is considered and  
18 treated by employees is certainly relevant to the question of  
19 whether the company treats it and considers it to be  
20 confidential.

21           MR. MILLER: Understood, your Honor, although under  
22 corporate and agency law, respectfully, it's whether or not the  
23 employee is delegated that authority to act on behalf of the  
24 company. And I think, obviously, the evidence presented by the  
25 government and the evidence in this case is about that



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1 question, certainly; and the answer is that Mr. Finzer acts as  
2 CEO on behalf of the company in entering into this  
3 confidentiality agreement. And that's what the jury is asking  
4 about, whether Mr. Finzer -- whether the company, OpenSea,  
5 considered this information confidential.

6 THE COURT: I agree with that. And that's the last  
7 point I'm made, that I'm not sure the parties' briefing or my  
8 analysis focused enough on the nature of the particular people  
9 involved and what the nature of their duties and  
10 responsibilities were.

11 I think a pretty strong argument could be made, by  
12 virtue of being head of product and having been basically  
13 delegated the responsibility to administer the featured NFT  
14 program, that it was within the purview of Mr. Chastain's  
15 duties and responsibilities to basically handle that  
16 information; and, therefore, how he treated it, and how he  
17 thought about it, is imputable to the company under traditional  
18 principles of agency law.

19 MR. MILLER: I understand your Honor's point.

20 Look, in this case, the only question, as your Honor  
21 is noting, for the jury's note, is whether or not the company  
22 considered the information confidential such that it qualifies  
23 as confidential business information and then, potentially,  
24 property. That's the only question here.

25 We are very concerned, your Honor, that if your Honor

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1 starts instructing the jury about how the defendant's views on  
2 confidential information are relevant, that they're going to  
3 conflate elements 1 and 2. In this case, he wasn't authorized  
4 to speak on behalf of the company or to consider the company --  
5 as to whether or not the information was confidential. Our  
6 introduction of those exhibits go to a different question, as  
7 to what he understood and his state of mind, namely, element 2  
8 to be at issue, and that's a different question, your Honor.

9 THE COURT: So reining this in, your view is that some  
10 version of version 1 is appropriate?

11 MR. MILLER: Yes. And the only thing I wanted to say  
12 about that -- and I have previewed it before on the *Mahaffy*  
13 factors -- is, the jury's question goes to whether or not the  
14 information was considered confidential. Those factors in  
15 footnote 14 from *Mahaffy* go to whether or not the company  
16 treated the information as confidential. And we think that's,  
17 frankly, unnecessary to start wading into, considering the  
18 jury's question.

19 Other than that, we think that it's certainly a  
20 correct statement of law to talk about that it's the company,  
21 not the defendant's, views as confidential information that's  
22 relevant here. And Mr. Finzer, as a duly authorized officer of  
23 the company, who entered into GX 214, is the inquiry here,  
24 determining whether or not the information is confidential.

25 THE COURT: All right.

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1           So your view is version 1 but without the second  
2 paragraph or the second substantive paragraph?

3           MR. MILLER: Yes, your Honor.

4           THE COURT: All right.

5           Government?

6           MR. ROOS: So the government's view is that version 3  
7 is appropriate. Let's start with *Mahaffy*.

8           *Mahaffy* says in the footnote that in deciding whether  
9 or not information is confidential business information, among  
10 other things, the Court should instruct how the information is  
11 treated by the company.

12           Your Honor has a correct recitation of the law, in  
13 principle, in paragraph 2. That paragraph, in fact, instructs  
14 that the extent to which the information is known outside the  
15 company's place of business, the ways in which other employees  
16 may access and use the information, are all things that the  
17 jury can consider in assessing whether or not the information  
18 is treated as confidential, which, in turn, is informative of  
19 whether or not it is confidential business information.

20           So on the questions you raised with Mr. Miller, I'll  
21 say two things:

22           One, we agree with the point that, given the  
23 defendant's role, his prominence in featuring NFTs, it actually  
24 it would be correct to give an instruction that the jury can  
25 consider his views about whether or not it was confidential in

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1 assessing whether it's confidential business information.

2 But even if the Court is not inclined to give that  
3 instruction, although we think it would be really appropriate,  
4 it certainly is correct to give the instruction, at the end of  
5 version 3, that simply states, not the views of the defendant,  
6 which is what I think defense counsel was getting at, but how  
7 it is treated, and that whether the defendant and other  
8 employees treated the information -- that is, of course, a  
9 relevant consideration for the jury in assessing whether or  
10 not, particularly applying the factors set forth in *Mahaffy*,  
11 the information is confidential.

12 To use a hypothetical, if there was a ton of evidence  
13 in the case that the defendant, in advance of featuring NFTs,  
14 was going around and saying, this is what I'm going to feature  
15 -- he was emailing all the artists in advance, he was posting it  
16 on his own Twitter account -- that certainly would be evidence  
17 that would be probative of the question of whether or not  
18 OpenSea treated the information as confidential, because while  
19 the defendant's conduct in terms of trading may be ultra vires,  
20 the way in which he behaved with respect to the information was  
21 within the scope of his employment.

22 So if he was saying to people, hey, I'm going to  
23 feature you next week, that would be probative evidence of how  
24 the company was treating the information, which, in turn,  
25 informs the confidentiality.

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1           So we think version 3 gives the jury the correct  
2 instruction and actually is more of a middle ground, versus  
3 what we think actually could be legally appropriate, which  
4 would be just to instruct them, yes, you can consider the  
5 defendant's views. But I'll note, this instruction doesn't  
6 even discuss the defendant's views.

7           THE COURT: Slow down a little.

8           Okay.

9           MR. ROOS: If your Honor wants, I can address the  
10 points Mr. Miller raised about Devin Finzer being the exclusive  
11 signer, although obviously we disagree with that point, for the  
12 reasons your Honor stated.

13          THE COURT: If you want to make a record, make a  
14 record.

15          MR. ROOS: Sure. I think there are a few points  
16 there.

17          First of all, as version 3 states, the question is  
18 about the company, not a particular individual. The testimony  
19 in the case is that there is two founders. The jury can  
20 evaluate their testimony and the evidence in deciding what the  
21 company viewed as confidential information as well as the other  
22 evidence.

23          I think, second, your Honor made a very good point,  
24 that the agreement in question was ratified prior to the  
25 featured information even happening, which sort of raises the

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1 question of whether it is really indicative in any way of who  
2 is the correct decider of what is confidential information.

3 Third, the cases cited by Mr. Miller go not so much to  
4 the agency principle of whose conduct can be imputed to the  
5 company but, rather, whose conduct can bind the company, which  
6 I think has sort of a narrow distinction to it. These are  
7 principles of contract law about like who within a company can  
8 bind it. The law is broader on who can act on behalf of the  
9 company.

10 So even if it was right that only Mr. Finzer is the  
11 one who could sign contracts on behalf of the company, which I  
12 don't think is the case, it certainly is also true that  
13 employees acting within the scope of their duties, particularly  
14 if they have managerial functions or they're the head of  
15 product, can act on behalf of the company.

16 THE COURT: Can I ask you to address the import of the  
17 pretrial litigation and ruling on essentially the opinions of  
18 Ms. Phan and other employees, and that is to say, one could --  
19 I'm trying to think of how to phrase this.

20 I guess the question is whether, and to what extent, I  
21 precluded inquiry into employees' views of whether the  
22 information was confidential, which is different than -- and  
23 I'm not sure I did. Your motion asked me to preclude inquiry  
24 into essentially the meaning of the contract and whether the  
25 rules and the contract were clear or not clear. That's a

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1 different question, I think, in my view, than how was this  
2 information thought about or treated within the company.

3 I think there were questions asked of Mr. Viau, who's  
4 the only employee who testified -- well, he testified to these  
5 issues, at least. I think there were questions asked of him  
6 about whether this information was shared outside the company,  
7 whether it was shared even within the company, and so on and so  
8 forth.

9 So that's one way of viewing it. But I guess the  
10 question is whether, and to what extent, I precluded inquiry  
11 into employees' views of whether the information was  
12 confidential; if so, is that ruling essentially law of the case  
13 such that Mr. Chastain falls on the employee side of the line  
14 rather than the Finzer or Atallah side of the line?

15 MR. ROOS: I think the answer is, no.

16 So our brief said this last night -- and I think your  
17 Honor correctly described it -- which is, the government's  
18 motion was focused on employees of the company opining about  
19 basically their confidentiality agreements and whether or not  
20 they viewed them as clear. As your Honor recalls, the  
21 government's motion was focused not just on the relevancy but  
22 also making the point about lay opinion testimony about the  
23 legal meaning of these contracts or the sort of how strong of a  
24 contract they are.

25 That's very different than the question of how

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1 employees viewed and treated the information. So, as your  
2 Honor just stated, Mr. Viau was on the stand and was asked,  
3 both on direct and on cross-examination, questions about the  
4 ways in which the information was treated. So, for instance,  
5 he was asked, was this information shared amongst people in the  
6 company, did you discuss it with other people, was there ever a  
7 time you recall the information leaking out of the company, do  
8 you recall times where the information was shared publicly  
9 prior to it being posted on the website, testimony about when  
10 was the first time you would learn about the information that  
11 is being described as confidential business information?

12 So all of that was permissible testimony throughout  
13 the trial. What was limited was a much narrower question,  
14 which is people interpreting these agreements.

15 In any event, even if that was an issue, I think your  
16 Honor's instruction in version 3 solves it because your Honor  
17 is not instructing the jury in this proposal to consider the  
18 views of any particular employee but, rather, how the  
19 information was treated by employees, which is different and  
20 was certainly not precluded. There was ample evidence of that  
21 throughout the trial.

22 THE COURT: All right.

23 Mr. Miller?

24 MR. MILLER: What Mr. Roos just said really signifies  
25 why version 3 should not be the version that's responded to.



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1           We're not talking about how the information was  
2 treated. The jury's question has to do with the consideration  
3 of whether the information is confidential, not the treatment  
4 thereof. Much of Mr. Roos' arguments right now — I wrote down  
5 at least three or four times where he talked about how OpenSea  
6 treated the information. That is not the jury's question. The  
7 jury is talking about the consideration of the information as  
8 confidential. That's the first point.

9           The second point is that Mr. Roos talked about how  
10 other employees could act on behalf of the company. I guess I  
11 go back to what I was saying earlier. And, as we set forth in  
12 our letter brief, the issue under corporate and agency law is  
13 whether somebody is delegating and authorized to act on behalf  
14 of the company. And version 3 talks about employees, but it  
15 doesn't say whether or not they're delegated or authorized,  
16 and, frankly, there's been no testimony by the government,  
17 elicited by the government, at this trial on that point.

18           So now we're heading into waters where the jury is  
19 going to get confused as to who's authorized, who's delegated.  
20 The government put forward an entire case that was premised  
21 upon Mr. Finzer and Mr. Atallah testifying about their views as  
22 to whether or not GX 214 and the confidentiality provision in  
23 that exhibit covered this conduct. We respectfully believe  
24 that we were precluded from calling other employees to testify  
25 as to their views, unlike Mr. Finzer and Mr. Atallah's views,

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1 on whether or not the confidentiality provision in GX 214  
2 applied to this conduct, namely, whether or not the information  
3 was confidential under this first element. We did not call  
4 people for that reason.

5 Your Honor's motion in limine order specifically says  
6 that we're free to question OpenSea employees, including Phan,  
7 about the existence or nonexistence of relevant policies and  
8 trainings, and that we're free to make arguments at trial based  
9 on the language of such policy and trainings. But we were not  
10 permitted to inquire of other employees whether they viewed the  
11 confidentiality provisions as applying to this particular  
12 information.

13 So that's an important point, your Honor. It's why we  
14 raised it in our letter brief last night.

15 THE COURT: But I don't think I ever said that you  
16 can't ask questions about, was this information treated as  
17 confidential, putting aside the meaning of that term within the  
18 GX 214. In other words, was it discussed openly? Was it  
19 shared with people outside the company? How was it treated?  
20 Was it closely held?

21 Those are all fact questions that are well within  
22 bounds, and I don't think any of my rulings, any of the  
23 government's motions, suggested otherwise.

24 MR. MILLER: Well, with all due respect, Judge, again,  
25 I think we're conflating the two parts here, on consideration

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1 versus treatment of confidential information. And the jury is  
2 asking about consideration – was it considered confidential –  
3 and we keep sort of going back into the treatment and the  
4 *Mahaffy* factors. That's not what they're asking about in this  
5 note, and we fear that we're going to bleed over into a whole  
6 area that the jury is not even asking about and that would be  
7 unduly prejudicial to the defense, your Honor.

8 So that's a key point here. Look, the principles of  
9 corporate and agency law are clear on this, on who is  
10 authorized and delegated. And just sort of referencing other  
11 employees is not appropriate, it's not right under the law;  
12 and, indeed, there's been no evidence presented by the  
13 government, who bears the burden, obviously, as to who was  
14 authorized and delegated, other than calling the cofounders per  
15 your Honor's order.

16 So we need to focus, respectfully, Judge, on whether  
17 the information was considered confidential. That is their  
18 question. And I fear that we're bleeding over into an area  
19 they're not asking about, and we're going to wind up unduly  
20 prejudicing the defense. This is a key question that's being  
21 asked by the jury that goes to reasonable doubt, your Honor.

22 THE COURT: Mr. Roos?

23 MR. ROOS: I just think a few points:

24 Treatment is circumstantial evidence, circumstantial  
25 or direct evidence, of how the information was considered. So

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1 Mahaffy certainly spells out the consideration and treatment,  
2 but the ways in which information was treated can certainly be  
3 probative of how it is considered, sort of the classic, you  
4 know, actions and words are probative evidence of a fact in a  
5 case.

6 The second point here is: If the concern is the  
7 ambiguity about the word "officer/employee," I think the simple  
8 fix is just to provide more details about who we're talking  
9 about. We could say the defendant and the other cofounder.

10 MR. MILLER: Respectfully, Judge, that's not  
11 appropriate.

12 THE COURT: I'm not going to do that.

13 I think I want to think about this for a minute or  
14 two, but let me ask one final question before I do my thinking.

15 On this discussion, I'm sort of inclined to think the  
16 government has the better of the argument, at least as to the  
17 relevance of the defendant's conduct, and, in that regard, that  
18 version 3 is not an inaccurate statement of the law.

19 I'm also inclined to think that Mr. Miller is putting  
20 too much weight on the distinction between "considered" and  
21 "treated." That is to say, I'm not sure that the Mahaffy  
22 factors are -- yes, footnote 14 says, in considering how to  
23 evaluate whether employers treat information is confidential,  
24 and then cites various pertinent factors, but it's in the  
25 context of a footnote that's bracketed by "considered and

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1 treated" and "considered," and I just don't know that there's  
2 as sharp a distinction between those things, not to mention, as  
3 Mr. Roos says, how it's treated is certainly probative of how  
4 it's considered within the company.

5 Having said all of that, I'm tempted, given this  
6 discussion, because I think there are some thorny issues that  
7 we haven't fully thought through, to go with some version of  
8 version 2, which kind of doesn't speak directly to the issue at  
9 all, on the theory that if the jury is not satisfied with that,  
10 and wants to ask more directly about what relevance, if any,  
11 does the defendant's treatment or views have, that they will;  
12 and in the meantime you guys can give thought to how we would  
13 answer that question if it were posed.

14 So before I close this up and figure out what we're  
15 going to do, any thoughts on that?

16 MR. ROOS: I guess our concern with version 2 is that  
17 by not having the defendant in there, when the question asks if  
18 X for the defendant but Y for Finzer, whether the omission will  
19 be interpreted by the jury as sort of a negative implication by  
20 not including the defendant, particularly when employees --  
21 including the phrase in the second paragraph "other employees"  
22 are discussed throughout the proposal, I think, given the fact  
23 that version 3 correctly states the law, it's going to provide  
24 the most clarity and not risk sort of an unintended implication  
25 to the jury.

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1 MR. MILLER: Your Honor, we think that of the three,  
2 version 1 is the correct statement of the law. We object to  
3 the use of versions 2 and 3, just for the record here. We  
4 think this is going to inject real problems into the jury's  
5 deliberation.

6 If your Honor is intent -- we definitely should not go  
7 with version 3. That is an incorrect statement of the law, for  
8 all the reasons I already stated, but for version 2, if your  
9 Honor is going to go with version 2, we hope you go with  
10 version 1, but if you go with version 2, we don't think it's  
11 appropriate to add the information Mr. Roos just specified, for  
12 all the reasons I've already said. But if you're going to go  
13 with version 2, we don't think, in the first sentence, it  
14 should say "not on any single officer or employee," because  
15 that's not correct. A single employee or officer can be duly  
16 authorized and delegated the authority to do it, as happened  
17 here with Mr. Finzer signing GX 214.

18 So that's a real concern we have in that clause being  
19 in that sentence, but I'm not going to belabor the point. Your  
20 Honor knows my arguments.

21 THE COURT: All right.

22 I'm going to take a couple-minute break just to think  
23 this through, potentially look at a couple things, and I will  
24 be back to you to let you know what my ruling is.

25 So bear with me, stay here, and I will be back

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1       shortly. Thank you.

2               COUNSEL: Thank you.

3               (Recess)

4               THE COURT: Now, I don't feel great about this whole  
5       thing. I think there are a number of very thorny issues here  
6       that I wish I had more time to grapple with and we had sort of  
7       focused on before trial and briefed, the heart of the matter  
8       being, for instance, whether if there was evidence that  
9       Mr. Chastain, within the scope of his employment, considered  
10      this information to be confidential, does that speak to whether  
11      it is confidential business information for purposes of the  
12      first element? I think it probably does, which is why I don't  
13      think that version 1 is an accurate statement of the law.

14              Long story short, obviously recognizing that  
15      objections are preserved, I'm going with a version of version 3  
16      but with a couple changes that I've made in response to the  
17      arguments that were made this morning. They're all to the  
18      fourth paragraph, and let me identify them.

19              First, I've stricken the words "not on any single  
20      officer or employee," just on the theory that it is unnecessary  
21      and it suffices to say the focus is on the company.

22              I have stricken reference to the defendant from the  
23      other information or evidence that the jury can consider. So  
24      it now reads just "including how employees at OpenSea treated  
25      the information," and then I added the words "within the scope

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1 of their employment," since I think Mr. Miller's point on that  
2 is somewhat well taken — if somebody had some private thought  
3 that had nothing to do with their job, that obviously wouldn't  
4 be relevant or admissible to the question.

5 So my plan is to bring the jury out, read them this  
6 answer, and it is what it is.

7 Anything else either side wishes to say before I do  
8 that?

9 MR. MILLER: Your Honor, obviously, my objections to  
10 this are preserved. We think this is a really important issue.

11 THE COURT: Understood.

12 Mr. Roos?

13 MR. ROOS: Nothing else.

14 THE COURT: Okay. So we'll bring the jury out. I  
15 will read them this. As you can see, I gave them copies.

16 For what it's worth, I will docket the versions 1, 2,  
17 and 3 drafts that I gave you so that they're part of the record  
18 and it's clear, in the event that it's necessary, what we were  
19 discussing. And we'll go from there.

20 As I think you know, I have a final pretrial  
21 conference in my next trial. That's scheduled to start in ten  
22 minutes, so once we excuse the jury, I'll ask you to clear out  
23 and make room for those parties to come in.

24 (Jury present)

25 THE COURT: You may be seated.



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1           Good morning, ladies and gentlemen. Thank you for  
2 getting here on time, and sorry to keep you waiting. We have  
3 an answer to your most recent question posed in the note that  
4 we received yesterday at the end of the day, which reads: "Re  
5 Count One, element 1, if the defendant viewed the information  
6 as confidential but Devin Finzer, the other signatory to the  
7 confidentiality agreement, did not, is that enough to consider  
8 it confidential?"

9           I have given you a written copy of my answer. I'm  
10 going to read it, as I did the final instructions, so listen to  
11 what say, but you also may take your copy into the jury room if  
12 that is helpful.

13           Your question concerns the first element of Count One.

14           As I previously instructed you, the first element of  
15 Count One requires the government to prove beyond a reasonable  
16 doubt that there was a scheme or artifice to defraud OpenSea of  
17 its property – specifically, its "confidential business  
18 information." Information is "confidential business  
19 information" if it was acquired or created by a business for a  
20 business purpose, and the business both considered and treated  
21 that information in a way that maintained the company's  
22 exclusive right to that information. That is, the company must  
23 both consider the information to be confidential and take  
24 affirmative steps to treat the information as confidential and  
25 maintain exclusivity; if the company "considers" information to

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1 be confidential but does not take affirmative steps to treat it  
2 as such and maintain exclusivity, it does not qualify as  
3 property.

4 As I previously explained, some of the factors you may  
5 consider in determining whether OpenSea treated the information  
6 at issue as confidential include, but are not limited to:  
7 Written company policies and agreements, employee training,  
8 measures the employer has taken to guard the information's  
9 secrecy, the extent to which the information is known outside  
10 the employer's place of business, the ways in which other  
11 employees may access and use the information, and whether the  
12 information had economic value to the employer.

13 As these instructions suggest, the focus of the  
14 inquiry with respect to whether the information at issue was  
15 "confidential business information" is on the company, namely,  
16 OpenSea. Of course, a company can act only through its  
17 officers, employees, and corporate materials, such as policies  
18 and agreements. Thus, in evaluating how OpenSea considered and  
19 treated the information at issue, you may consider the conduct  
20 and testimony of Mr. Finzer, as an officer of the company, as  
21 well as any other evidence that relates to the issue, including  
22 how employees at OpenSea treated the information within the  
23 scope of their employment and any other evidence relevant to  
24 the factors referenced above. What weight, if any, you give  
25 any such evidence is, of course, for you to decide.

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1 With that, I will excuse you to continue your  
2 deliberations. And you know where to find us. Thank you very  
3 much, and you're excused at this time.

4 (Jury not present)

5 THE COURT: You may be seated.

6 I'll step down from the bench so that we can get ready  
7 for the next matter, unless there's anything we need to  
8 discuss.

9 Government?

10 MR. ROOS: No, your Honor.

11 THE COURT: Mr. Miller?

12 MR. MILLER: No, your Honor.

13 THE COURT: All right. See you when I see you. Thank  
14 you.

15 (Recess pending verdict)

16 THE COURT: Welcome back. No rest for the weary  
17 today.

18 I received two notes since we last convened. Let me  
19 read them into the record.

20 The first, which is dated today, at 10:04 a.m., signed  
21 by the foreperson, reads as follows: "May we have the  
22 testimony of Ryan Foutty, please?"

23 I have marked this as Court Exhibit 4, and, with the  
24 parties' agreement, submitted to the jury copies of  
25 Mr. Foutty's testimony with the agreed-upon previous

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1 redactions. So that was easily accomplished.

2 The more recent note, dated today, at 10:40 a.m.,  
3 signed by the foreperson, reads as follows: "In the court of  
4 law, can you provide a definition of trade secret? Thank you."

5 I'll mark this as Court Exhibit 5.

6 And what are your thoughts?

7 MR. MILLER: So, Judge, our view actually is sort of  
8 fairly simple, that the evidence is what it is. There's no  
9 real set definition of trade secret. This is a highly  
10 litigated, contested issue. I'm sure many of the lawyers,  
11 including myself, have argued what the definition of a trade  
12 secret is.

13 The government had every opportunity to present  
14 evidence about this. They did not. They pointed, for example,  
15 in GX 214, to product or services or plans, and they got  
16 testimony with respect to Mr. Atallah about that. But the  
17 issue is what OpenSea's view of the information is, and there's  
18 no standard definition of trade secrets that one can point to.  
19 Once again, it's a hotly litigated issue in commercial  
20 disputes.

21 So our view is that the jury should be instructed that  
22 the evidence is what it is. The government presented their  
23 case. Obviously, they had a chance to put in whatever they  
24 wanted about trade secrets, and they did not. To start trying  
25 to articulate a definition now, which I guarantee will be a

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1 contested one, is not appropriate, in our view, given that the  
2 evidence is what it is and there's no evidence about trade  
3 secrets.

4 THE COURT: Okay.

5 Mr. Roos?

6 MR. ROOS: So we're not asking for the Court to define  
7 the term "trade secret." It appears no where in the Court's  
8 instructions, it doesn't appear in the agreement -- or I don't  
9 think necessarily the Court needs to define terms in an  
10 agreement, particularly since it's not a breach of contract  
11 case.

12 What we would propose is:

13 First, the Court direct the jury to the Court's  
14 definition of confidential business information, and consider  
15 noting that those instructions do not use the word "trade  
16 secret."

17 Second, inform the jury that information may qualify  
18 as confidential whether or not it constitutes a trade secret,  
19 which is a sentence from *Mahaffy* at page 136.

20 And, third, tell the jury that, as it considers  
21 whether the information was confidential, applying the Court's  
22 instructions, it may consider, but it's not limited to, the  
23 terms of OpenSea's confidentiality agreement and should  
24 consider that agreement along with the testimony and the other  
25 evidence as it bears on the meaning of confidential information

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1 or whether it's confidential information.

2 THE COURT: I'm not going to do the third thing  
3 because that's well beyond the scope of their question, which  
4 is just a straightforward question about what the definition of  
5 trade secret is. And while it is used in GX 214, it would be  
6 speculation to assume that that's the basis for the jury's  
7 question, and we just don't know.

8 I guess I am inclined to say something along the lines  
9 of, you know, the phrase "trade secret" appears nowhere in my  
10 instructions, I instruct you that information may qualify as  
11 confidential business information even if it does not  
12 constitute a trade secret, and perhaps leave it at that.

13 MR. MILLER: Judge, we disagree with that. Your Honor  
14 is essentially pointing them to a provision, saying what  
15 something is not. I think your Honor could easily respond,  
16 rather than sort of directing the jury in a certain way or  
17 direction, to say, you have my instructions, you have the  
18 evidence in this case, the evidence is what it is, the parties  
19 put on their evidence, you know, take a look at the evidence,  
20 and leave it at that.

21 I don't think it's appropriate, respectfully, to start  
22 pointing them, as Mr. Roos suggested, to say, you know,  
23 information can be confidential even if it's not a trade  
24 secret. That wasn't their question, and that's directing them  
25 in a certain direction with their deliberations. And we

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1 strenuously object to that.

2 THE COURT: All right. Let me ponder for one moment.

3 (Pause)

4 MR. FILOR: Your Honor, if I may?

5 THE COURT: Yes.

6 MR. FILOR: Just as an example of how confusing this  
7 issue is with respect to trade secrets:

8 First, there is a conflict of law issue, but assuming  
9 it is California law, under GX 214, there's authority under  
10 California law that if even one customer is aware of the  
11 information, without being under a secrecy agreement or NDA, it  
12 is not trade secret. And, here, we know that at least the  
13 first artist and another artist in the record was aware of this  
14 information, therefore, it cannot be trade secret. And the  
15 authority on that would include *Whyte v. Schlage*, 101 Cal. App.  
16 4th, at 1443, 1455, which is a 2002 case.

17 Additional authority would suggest the same, your  
18 Honor. So we don't believe it is trade secret, but, again,  
19 it's just pointing out how confusing the question is for the  
20 jury.

21 THE COURT: So I think everybody's in agreement, I  
22 shouldn't actually define the term "trade secret," but I think  
23 the only relevant question is whether to say something to the  
24 effect about the relationship between trade secret and  
25 confidential business information.

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1           Let me throw out the following as a possibility, which  
2 essentially tells them I'm not answering their question: You  
3 have asked about the definition of trade secret. In connection  
4 with your deliberations, you must decide whether the  
5 information at issue is quote-unquote confidential business  
6 information, as I have defined that phrase for you. The  
7 meaning of trade secret and the meaning of confidential  
8 business information are different, and you should concern  
9 yourself only with the latter.

10           Any objection?

11           MR. ROOS: So two things, your Honor:

12           One is, I don't know that necessarily trade secret is  
13 different from confidential. I think, as the agreement  
14 evidences, there's a scenario where a trade secret can be  
15 confidential or confidential can mean trade secret.  
16 Confidential obviously encompasses a broader set of  
17 information. And so, in that way, there's a difference, but I  
18 guess we're concerned that the word "different" may make them  
19 think trade secret is not equal.

20           And the other is the part of the instruction says you  
21 should not concern yourself with trade secret might sort of  
22 imply to the jury that they should disregard that term in the  
23 agreement. I'm not sure if that is, frankly, good or bad for  
24 the government, but I think probably the reason why the *Mahaffy*  
25 formulation, which is just sort of whether or not it's trade



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1 secret, doesn't matter for whether it's confidential, is  
2 helpful is because it takes a neutral tone in terms of the two  
3 terms. It just makes clear there's not an equivalency or  
4 nonequivalency between them.

5 THE COURT: Mr. Miller?

6 MR. MILLER: Yes, your Honor.

7 Again, I'll go back to my initial point. I don't know  
8 that we should be wading into this issue, that your Honor's  
9 instructions and the evidence are what they are.

10 If your Honor is inclined to start discussing  
11 confidential business information definition versus trade  
12 secrets, your Honor's instruction made more sense, but, again,  
13 I'm concerned about us sort of wading into this issue,  
14 considering that right now there's no evidence in the record  
15 about it, and the definition is not easy.

16 THE COURT: Well, Mr. Miller the definition of a trade  
17 secret is actually a legal question, and even the meaning of  
18 the term in the contract is a legal term. In contract cases,  
19 it's a matter for the Court to construe the contract, so if  
20 there's ambiguity, that's one thing, but it is a technical  
21 legal term and, yes, it may be a function of what law governs,  
22 but I think everybody would agree that in a contract case, it  
23 would be up to me to construe what the meaning of trade secret  
24 is in that agreement.

25 So that's a legal question. I don't think the absence

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1 of any evidence at trial as to what a trade secret means -- I'm  
2 not even sure that it would be proper, given that that's a  
3 legal question.

4 What the jury is asking me to do is tell them what  
5 that term means. It may be that they want assistance in  
6 deciding whether it qualifies as a trade secret and thus falls  
7 within the scope of the confidentiality provision, I don't  
8 know.

9 MR. MILLER: I hear your Honor. Certainly your Honor  
10 is correct about it being a legal issue.

11 I did sort of note at the beginning -- and I sort of  
12 rest on this -- that it's a hotly litigated question  
13 jurisdiction by jurisdiction, and it's not like there's some  
14 sort of easy answer to this.

15 So putting that aside, though, I think if your Honor  
16 is inclined to provide guidance, I think it probably makes  
17 sense, based on what your Honor's proposed instruction was, to  
18 say that it's different than confidential business information,  
19 may be appropriate but, again, this is sort of off the cuff. I  
20 think it's a difficult question, which is why I was sort of  
21 inclined to say, the evidence is what it is, my instructions  
22 were what they were.

23 THE COURT: All right.

24 Mr. Roos, your proposal is what exactly at this point?

25 MR. ROOS: At the beginning of your Honor's proposed

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1 instructions, with the final part being those -- "information  
2 may qualify as confidential, whether or not it constitutes a  
3 trade secret."

4 THE COURT: So, in other words, what I have, and then  
5 just with an additional sentence, so "including the meaning of  
6 trade secret and the meaning of confidential business  
7 information are different, and you should concern yourself only  
8 with the latter," and then you would add a sentence to that?

9 MR. ROOS: I think not the part "you should only  
10 concern yourself with the latter," since it is a term in the  
11 contract. Just the meanings are different, and then  
12 information may qualify as confidential whether or not it  
13 constitutes a trade secret.

14 THE COURT: And, Mr. Miller, just to circle back to  
15 you, your precise objection to that proposal?

16 MR. MILLER: I'm not sure that's correct as a matter  
17 of law.

18 And putting that aside, we're, again, essentially now  
19 directing the jury to say, well, it could be confidential if  
20 it's a trade secret, it might not. Again, I think we're wading  
21 into this when we shouldn't be.

22 The answer, we respectfully submit, should be: The  
23 evidence is what was presented, the government made its case,  
24 they had every opportunity to do this, they did not. And at  
25 this point the evidence is what it is, and the instructions are

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1 what they are. To start saying, well, it could be CBI,  
2 confidential business information, if it's a trade secret  
3 versus not, is now essentially injecting into their  
4 deliberations a definition that we haven't even litigated at  
5 this point.

6 MR. ROOS: On this, just to be clear, *Mahaffy* says  
7 information may qualify as confidential under *Carpenter* even if  
8 it does not constitute trade secret.

9 So I think to the Court's question, is it legally  
10 correct, yes, that is the circuit's holding.

11 On the question of confusion for the jury: I think to  
12 just throw up our hands and say it is what it is, they have the  
13 instructions, they have the law, is not going to be responsive  
14 to the question. I think the Court's formulation with the  
15 addition proposed by the government would, while not defining  
16 the term for them, particularly in light of the defense  
17 objection to that, would at least help them through the  
18 deliberative process and is a correct statement of the law.

19 MR. FILOR: Your Honor, very briefly?

20 THE COURT: Yes.

21 MR. FILOR: We don't object with your Honor's  
22 proposal, but we do object to the government's proposal.

23 The question from the jury is about trade secret. The  
24 government is now trying to point them in a different  
25 direction. Instead of responding to the question about trade

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1 secret, they're pointing to other things beyond that. When we  
2 did that with respect to the last jury question, the  
3 government, again, instead of focusing on the question, which  
4 was about Mr. Finzer, the government wanted to pack lots of  
5 things into the response, and then we started getting questions  
6 about other employees' testimony.

7 So the government is pointing the jury, in response to  
8 their particular questions, into other areas. It's not fair,  
9 your Honor.

10 (Pause)

11 THE COURT: All right. I'm inclined to instruct the  
12 jury as follows, including the language from *Mahaffy*, because I  
13 think it is an accurate statement of the law and speaks to the  
14 question:

15 You have asked about the definition of trade secret in  
16 connection with your deliberations. You must decide whether  
17 the information at issue is quote-unquote confidential business  
18 information, as I have defined that phrase for you. The  
19 meaning of trade secret and the meaning of confidential  
20 business information are different. Information may qualify as  
21 confidential business information even if it does not  
22 constitute a trade secret. In evaluating Count One, you should  
23 apply the definition of confidential business information as I  
24 have given it to you.

25 MR. ROOS: That's fine.

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1 THE COURT: It doesn't really answer their question,  
2 but since neither side is proffering a definition of the term  
3 that would be directly responsive, I think that's the best we  
4 can do.

5 MR. MILLER: And just for the record, the defense  
6 objects to the sentence, "Information may qualify as  
7 confidential business information even if it does not  
8 constitute a trade secret." We actually, as I had mentioned  
9 before, don't even think we should be going down this road  
10 generally, but if your Honor was intent on doing that, we had  
11 agreed to the other language; we don't agree with that  
12 sentence.

13 THE COURT: All right.

14 And just to clarify what the nature of the objection  
15 is, I take it you agree that is an accurate statement of the  
16 law since it's literally a direct quote from *Mahaffy* minus the  
17 reference to *Carpenter*?

18 MR. MILLER: Yes, I'm not quibbling with the *Mahaffy*  
19 quote. My concern is, as I articulated before, that we're  
20 directing the jury in a certain direction that we need not be  
21 at this point.

22 THE COURT: Okay. Understood.

23 I think it's sufficiently responsive to the jury's  
24 question because it eliminates the definition of the term and  
25 the definition of the term as it relates to the principal term

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1 that the jury needs to consider here.

2 Two options: One is, I could submit that in writing  
3 to the jury by letter and let them continue their  
4 deliberations. The second is, I can bring them out and  
5 instruct them orally.

6 Does anyone have a view or objection to either of  
7 those?

8 MR. ROOS: I think we're fine with your Honor just  
9 giving them a letter. Keep it moving.

10 MR. MILLER: The defense is fine with whatever your  
11 Honor would like to do on this.

12 THE COURT: All right. So then let's just send them  
13 in an answer.

14 I'll add to it: "To the members of the jury: In your  
15 note from today at 10:40 a.m., you have asked about the  
16 definition," and go from there.

17 (Pause)

18 THE COURT: All right. I've signed that. I'll have  
19 my deputy show it to each side to ensure that you're okay with  
20 it, subject to obviously the objections you've already  
21 preserved, and then we'll send it in.

22 (Pause)

23 THE COURT: From the government?

24 MR. ROOS: That's fine.

25 THE COURT: Mr. Miller?

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1 MR. MILLER: Subject to our objections before, it's  
2 fine.

3 THE COURT: All right, very good.

4 We'll send that in. I will see you when we get  
5 another note.

6 Thank you.

7 (Recess pending verdict)

8 THE COURT: Welcome back.

9 As you, I think, know, we've received another note.  
10 Unfortunately, I had a sentencing that started literally  
11 moments after I got it, so it has caused more delay than I  
12 would like, but here it is -- dated today, received at  
13 2:12 p.m., signed by the foreperson. It states as follows:  
14 "Regarding Count Two, the fourth element, do the 'transactions'  
15 refer specifically to those that involved interstate commerce  
16 or," underlined, "do they also include other transactions that  
17 did not," underlined, all caps, "occur across state lines?"

18 I will confess that I have barely had a moment to  
19 think about it, as I was sentencing somebody, so I will turn to  
20 you first.

21 MR. MILLER: So, your Honor, I think this might be an  
22 easier one.

23 THE COURT: Ah, I love those words.

24 MR. MILLER: It looks to us like what the Court should  
25 do is, in defining transaction -- frankly, it already has done



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1 that on page 19, lines 16 and 17. It's under a different  
2 element, but it's what the term "financial transaction" means,  
3 which comes from 18 U.S.C. 1956(c)(4).

4 So this language is from 56(c)(4). We suggest that  
5 your Honor refer the jurors back to this language. And I think  
6 that answers the question, frankly.

7 They sort of mix concepts in there, but I think,  
8 ultimately, that's the answer to this.

9 THE COURT: Sorry, 19?

10 MR. MILLER: Sorry, 18 U.S.C. 1956 --

11 THE COURT: The page of the instruction.

12 MR. MILLER: I'm sorry. At page 19, lines 16 and 17,  
13 your Honor defines -- financial transaction includes any  
14 transaction that involves the movements of funds by wire or  
15 other means and in any way or degree affects interstate  
16 commerce.

17 And they're asking, do the transactions refer  
18 specifically to those that involved interstate commerce?

19 We think the answer to that is the transactions are  
20 those that involve the movements of funds by wire or other  
21 means and in any way or degree affects interstate commerce.

22 That comes from 18 U.S.C. 1956(c)(4). It's the  
23 definition of financial transaction.

24 So we would submit, since that is obviously what  
25 transaction means -- and I think they're referring and looking

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1 to, with their question, page 21, the second sentence, which  
2 talks about the defendant conducting financial transactions  
3 with knowledge, that the transactions were designed in whole or  
4 in part to conceal, and so they're wondering whether those  
5 transactions have to affect in some way interstate commerce.

6 The answer, we think, is yes, but your Honor's  
7 definition here matches up with the definition in Title 18. So  
8 we would suggest reminding the jurors of that.

9 THE COURT: Government?

10 MR. ROOS: I'm going to introduce two complications.

11 The first, which I'll confess I don't have an answer  
12 to, is that 1956 has separate definitions of transaction and  
13 financial transaction. As your Honor sees, the first element  
14 uses the phrase "financial transaction," which references  
15 transaction but introduces the interstate or foreign commerce  
16 element.

17 I think there is a question, which unfortunately I do  
18 not yet have the answer to, of whether the fourth element,  
19 which is the purpose clause in the statute and only uses the  
20 word "transaction," necessarily incorporates the interstate  
21 commerce element, such that there is a requirement that that be  
22 the transaction or transactions that affected interstate or  
23 foreign commerce.

24 The second complication I wanted to identify is that  
25 the jury's note seems to phrase the question not in the

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1 language that defense counsel used, of affecting interstate  
2 commerce in any way, but, rather, the issue of state lines,  
3 which I think is at least something in crafting the answer  
4 we'll have to perhaps not answer in the way of yes or no on  
5 state lines, since obviously that's not the law.

6 THE COURT: So having posed those problems, how do you  
7 think I should handle the note?

8 MR. ROOS: So I think in terms of answering -- I want  
9 to take the second problem.

10 In terms of answering the question, however your Honor  
11 answers the question, I think it might be appropriate to sort  
12 of rephrase it -- as opposed to just saying yes or no -- rephrase  
13 it using the language of your Honor's instructions about the  
14 effect on interstate commerce, as opposed to adopting sort of  
15 the like state lines formulation. I think that is a drafting  
16 exercise that probably should be fairly straightforward.

17 The financial transaction versus transaction question  
18 is something that potentially is knowable, and perhaps with a  
19 little more time, we could dig into it more.

20 THE COURT: You've had an hour.

21 MR. ROOS: I know, that's true.

22 MR. MILLER: If I might, your Honor, I don't think  
23 it's that complicated. I think your Honor's sentence on page  
24 21, the second sentence, which is derived from 1956, under  
25 "Concealment," talks about how there has to be proof that the

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1 defendant conducted financial transactions with knowledge that  
2 the transactions – that comes primarily from 1956, looking at  
3 it right now.

4 So, "the transactions" obviously refers to the  
5 financial transactions that we're discussing, and "financial  
6 transactions" are defined in the statute as those that in any  
7 way or degree affect interstate commerce. I do not think we  
8 have to engage with the across state line concept.

9 I think your Honor just needs to remind them of the  
10 definition of financial transactions which comes from the  
11 statute. And I don't think there's a distinction, given the  
12 context here, which comes from 1956, between somehow a  
13 financial transaction that has to affect interstate commerce  
14 and a transaction somehow that doesn't. That wouldn't make any  
15 sense, particularly in the context of the concealment money  
16 laundering statute.

17 THE COURT: And what import do you think the fact that  
18 the statute separately defines "transaction" and "financial  
19 transaction" has?

20 MR. MILLER: We've wrestled with this before.  
21 Certainly in the context of our motion to dismiss we were  
22 wrestling with this.

23 Candidly, there's not a lot of law on this. We've  
24 looked into this a little bit before. We do think that, here,  
25 there isn't really a distinction when it comes to the

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1 concealment element, and that really what we're talking about  
2 are transactions that in some way, or whatever the language is  
3 here, in any way or degree affects interstate commerce.

4 That's what we believe is appropriate, but I concede  
5 that there's not a lot of law on this.

6 THE COURT: Mr. Roos?

7 MR. ROOS: I'll add a point in each direction.

8 So, first, in the direction of it being the same  
9 transaction, of course, the statute does say the word "the"  
10 before "transaction." So just to be candid with Court, I'm  
11 arguing against myself, but it does say "financial transaction"  
12 and then the purpose of the transaction, which I think you  
13 could -- there is an interpretation to read the word "the" to  
14 mean the same transaction.

15 On the other hand, in the clause immediately following  
16 that, there is a discussion at the end of the paragraph about a  
17 financial transaction shall be considered to be one involving  
18 the proceeds of specified unlawful activity if it is part of a  
19 set of parallel or dependent transactions, any one of which  
20 involves the proceeds of specified unlawful activity and all of  
21 which are part of a single plan or arrangement.

22 I think that language has been applied or interpreted  
23 by some courts in deciding the question of whether the money  
24 laundering charge raises a continuing offense such that you  
25 could have a financial transaction and other transactions, part

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1 of the offense, without requiring a unity between the  
2 transactions in terms of the interstate nexus element and the  
3 purpose element.

4 I'll tell the Court, we've seen two cases from the  
5 Eastern District calling it a continuing offense and a case  
6 from the Eastern District of Pennsylvania and the Eastern  
7 District of Tennessee in which they called it like a  
8 single-unit offense. So I don't think there's a circuit case  
9 on this that is dispositive of the question, although it's  
10 something we're still looking at.

11 THE COURT: My law clerk found a case that I'm now  
12 trying to look at from the Sixth Circuit, *United States v.*  
13 *Ables*, 167 F.3d 1021. Since I haven't yet looked at it myself,  
14 I can't speak to whether it answers this question, but I don't  
15 know if either of you guys has come across that case or has any  
16 views on it.

17 I'm going to guess, from the deafening silence, that  
18 the answer is no.

19 Are you able to pull it up?

20 MR. ROOS: We're reading it right now.

21 THE COURT: Great. So we can all look at it together.

22 Mr. Miller, can you get it, or do you want me to print  
23 it out for you?

24 MR. MILLER: Sorry, Judge, if you don't mind printing  
25 it out, that would be appreciated.

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1 THE COURT: Why don't we print it for both sides since  
2 it includes highlighting; and, that way, you can both see  
3 what's highlighted.

4 Ms. Smallman, do you mind doing the honors, since I'm  
5 not sure I'm connected to the printer?

6 (Pause)

7 THE COURT: I think the key line, in reading it  
8 quickly, I identified it as near the end of the highlighted  
9 section, where it states – and this is 167 F.3d at 1030 – is  
10 "the government only needed to prove that each of *Ables*'  
11 prohibited transactions had a de minimis effect on interstate  
12 commerce."

13 So it reaffirms or reinforces the de minimis effect  
14 standard but seems to suggest that each transaction did have to  
15 have that effect.

16 So maybe that does shed light on this. But your  
17 thoughts?

18 MR. MILLER: Certainly, I think this case supports  
19 your Honor's interpretation, as well as the fact, again,  
20 looking at sort of the use of "the" as the qualifier before  
21 "transactions" in 1956, seems to indicate that each transaction  
22 does have to have, in some way, an effect upon interstate  
23 commerce.

24 THE COURT: Mr. Roos?

25 MR. ROOS: I guess the reason I'm struggling with this

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1 case as really providing the answer is, it seems to be  
2 interpreting the beginning of the statute and the intersection  
3 between proceeds of specified unlawful activity and the  
4 interstate nexus element. I don't read it to be dealing with  
5 like the purpose requirement, which is where "transaction" is  
6 used.

7 THE COURT: Really, I think this focuses primarily on  
8 whether the *Lopez* substantial effects test applies.

9 MR. ROOS: Right.

10 THE COURT: So in that sense, it's not squarely on  
11 point. I guess I'm not entirely clear on what the government's  
12 view is of how I should answer the note.

13 MR. ROOS: We obviously don't want to your Honor to go  
14 out on a limb here, so can you give us one second?

15 (Pause)

16 MR. BURNETT: So I think this may be pretty similar to  
17 what the defense is asking for, but I think the way we would  
18 handle it is to direct the jury that, basically, like to set  
19 clear that element 1 is where they should be thinking about the  
20 jurisdictional element, so basically instructing the jury that,  
21 as I instructed you in element 1, for Count Two, you must  
22 determine whether the government has proved beyond a reasonable  
23 doubt that the defendant conducted a financial transaction that  
24 involved the movement of funds by wire or other means, and in  
25 any way or degree affected interstate commerce. In considering



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1 the fourth element, as you asked about, you should focus on  
2 whether the government proved beyond a reasonable doubt that  
3 the financial transaction you identified with respect to  
4 element 1, or part of that financial transaction, had the  
5 purpose of concealing – and the rest of the instruction from  
6 element 4 on concealment.

7 THE COURT: Mr. Miller?

8 MR. MILLER: Still processing, your Honor.

9 I think conceptually, I don't have a problem with  
10 pointing to the definition of financial transaction in the  
11 context of the government's burden to prove one under the first  
12 element, but then to the extent, I think that obviously – maybe  
13 this is what Mr. Burnett is suggesting – to then remind them  
14 that the definition of financial transaction, as you've  
15 instructed, applies with respect to the fourth element, I think  
16 that's generally what we were recommending anyway, so long as  
17 they're reminded that obviously the government has to prove  
18 beyond a reasonable doubt, et cetera, et cetera, within the  
19 fourth element.

20 THE COURT: All right. Let me take a stab at this.

21 (Pause)

22 THE COURT: Now that Ms. Smallman has given me the  
23 power to print, I have no limits to my abilities.

24 Here's a stab. We're working on the fly here, so this  
25 may or may not work as a starting point, but why don't you read

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1 that and then we can discuss.

2 (Pause)

3 THE COURT: Thoughts? Government?

4 MR. BURNETT: We'd propose one that I think goes to  
5 the financial transaction/transaction distinction that we were  
6 talking about.

7 So line 7, after the words "first element," we'd add,  
8 comma, "or some portion of that transaction," comma. And so  
9 you understand, I think I'll start with the text and then go to  
10 the case law point for this.

11 So, textually, what this is getting at, is that --

12 THE COURT: In whole or in part?

13 MR. BURNETT: What's that?

14 THE COURT: In whole or in part?

15 MR. BURNETT: In whole or in part, my understanding  
16 goes to whether the purpose was wholly to conceal or not to  
17 conceal, whereas this addition goes to the concept that a  
18 financial transaction can have multiple steps to it. That's  
19 why I think it's a distinct change. And that, I think,  
20 textually, goes to the idea that a financial transaction can  
21 have multiple steps, as we discussed in that penalty paragraph,  
22 and which is embodied in the difference between the difference  
23 of transaction and financial transaction.

24 The case that we saw that goes to this point is *U.S.*  
25 *v. Carcione*, which is an Eleventh Circuit case. It's 272 F.3d

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1 1297. Basically, our read of the case is that what was  
2 involved there was: You have a diamond theft that happens in  
3 one state. The diamond thief then takes the diamond across  
4 state lines to Illinois and within Illinois does a sale of the  
5 diamond. And the Court found that even though it was an  
6 intrastate sale – so the one part of the financial transaction  
7 didn't involve going across state lines – you look at the full  
8 transaction, and that full transaction involved or affected  
9 interstate commerce. We think this clause kind of gets to that  
10 concept.

11 THE COURT: All right.

12 Is that the only suggested edit?

13 MR. BURNETT: Yes.

14 THE COURT: Okay.

15 Mr. Miller?

16 MR. MILLER: I'm not sure I agree with that.

17 Ultimately, if you look at the statute – your Honor's  
18 instruction was tracking it, the "in whole or in part"  
19 language – I'm not sure we need to have to qualify this yet  
20 again.

21 And I understand what Mr. Burnett is saying, but I  
22 admittedly haven't read this Eleventh Circuit case he just  
23 cited, but I don't think that's necessary. I think you can  
24 track the statute, your Honor can track the statute, and we  
25 should do that.

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1 THE COURT: Am I correct in inferring that you  
2 therefore have no objection to my proposal, without the  
3 addition?

4 MR. MILLER: I think that's fine, your Honor, yes.

5 THE COURT: All right. Let me take a quick look at  
6 the case that the government cited.

7 MR. BURNETT: There is one other one that we also just  
8 found about two seconds ago. It's *U.S. v. Moloney*, it's the  
9 Second Circuit, and it's 287 F.3d 236, and we're looking at  
10 page 241.

11 THE COURT: It appears to have been abrogated by  
12 *United States v. Yousef*. But do we know on what point?

13 MR. ROOS: We saw it, too, and we think it's a  
14 different point, although we're chasing the red flags. *Yousef*  
15 also seems to be abrogated, so...

16 (Pause)

17 THE COURT: Help me out here. This seems to speak to  
18 whether money laundering can be charged as a continuing offense  
19 where it involves multiple sort of related transactions and was  
20 part of a unified scheme.

21 How does that speak to the issue that we're grappling  
22 with and that the jury asked about?

23 MR. BURNETT: So I think this goes to the point that  
24 the financial transaction they find in element 1 can affect  
25 interstate commerce and satisfy the jurisdictional element.

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1 But the portion, a subset, of that transaction that they find  
2 has the purpose to conceal need not by itself have an effect on  
3 interstate commerce if it's part of a broader financial  
4 transaction that does.

5 THE COURT: But the fourth element is not asking about  
6 whether it's concealing the financial transaction; it's  
7 concealing the proceeds of the unlawful activity.

8 MR. BURNETT: Right. And I think our view is -- so if  
9 financial transaction reflects a continuing offense, then the  
10 financial transaction that you find to satisfy the first  
11 element could involve a number of different transactions, and  
12 then when you're looking at the purpose part for element 4, the  
13 jury might say, okay, well, let's say there are three kind of  
14 subparts to this financial transaction that we identified in  
15 element 1, one of those subparts had the purpose to conceal the  
16 nature, location, origin, whatever, but that subpart was  
17 entirely intrastate. Yes, it was part of this broader  
18 financial transaction that affected interstate commerce but  
19 that subpart we're looking at was an intrastate one.

20 So that, I think, goes to the jury's question, which  
21 is, well, what if we think there's like a transaction that is  
22 intrastate as the second part of the question?

23 THE COURT: To the extent that that's the law, I agree  
24 that may speak to the jury's question. I'm just not sure that  
25 *Moloney* speaks to that issue, so I'm missing the leap between

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1 continuous offense and the proposition that if one piece of it  
2 is intrastate and that piece is the concealed part, that that  
3 can somehow satisfy the government's burden.

4 That seems like a different proposition to me, and it  
5 may be an accurate statement of the law, but I don't think it's  
6 supported by this case.

7 MR. BURNETT: I think the fact that there is the  
8 continuing offense piece is part of what we were talking about  
9 earlier about the distinction between financial transaction and  
10 transaction in the statute, and the continuing offense piece  
11 means the financial transaction can have a number of  
12 transactions, to satisfy the first element and you just need to  
13 focus on one of those subparts for the fourth element.

14 THE COURT: All right. I think we're getting a little  
15 far afield here, and I'm wary of sticking my neck out too far  
16 on complicated issues involving a complicated statute, without  
17 a case that seems to clearly say that.

18 So I'm going to, I think, stick with my draft  
19 language, which reads as follows: "The *first* element the  
20 government must prove beyond a reasonable doubt with respect to  
21 Count Two is that the defendant conducted a quote-unquote  
22 financial transaction, which includes any transaction that  
23 involves the movement of funds by wire or other means and in  
24 any way or degree affects interstate commerce. If you find  
25 that the defendant conducted a financial transaction within the

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1 meaning of that definition, then, to satisfy the *fourth* element  
2 of Count Two, the government must prove beyond a reasonable  
3 doubt that the defendant conducted the financial transaction  
4 you found for purposes of the first element with knowledge that  
5 the financial transaction was designed, in whole or in part, to  
6 conceal or disguise the nature, location, source, ownership, or  
7 control of the proceeds of the specified unlawful activity."

8 Having read it out loud, I have one change, which is,  
9 I'd be inclined to change the word "the" at the end of line 7,  
10 so it reads "with knowledge that that financial transaction,"  
11 to make clear we're talking about the same transaction.

12 Any objection to that?

13 MR. MILLER: No, thank you, Judge.

14 MR. BURNETT: No, your Honor.

15 THE COURT: All right.

16 So that's what we will do. Any objection to my  
17 sending this in by way of a letter in the same manner as last  
18 time?

19 MR. BURNETT: Not from the government.

20 MR. MILLER: At this point, Judge, we would appreciate  
21 the process of the jury coming in and hearing it from your  
22 Honor.

23 THE COURT: What's the theory?

24 MR. MILLER: It's the normal process, Judge. We would  
25 prefer to stick with it.

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1 THE COURT: Well, I don't think there's a normal  
2 process, and earlier you deferred to my judgment. It's 3:53.  
3 I think, rather than interrupt their deliberations,  
4 particularly since we've kept them waiting for an hour and 40  
5 minutes, I'm going to do it by letter, since I will bring them  
6 out in an hour if I don't hear from them sooner anyway.

7 Understood? Unless you can cite a case that stands  
8 for the proposition that it's error do it this way, I'll send  
9 it in by way of letter.

10 Judging from your silence, you don't have such a case.

11 Give me a moment.

12 (Pause)

13 THE COURT: I'm adding a preface: "In response to  
14 your note of 2:12 p.m. today, I instruct you as follows." And  
15 then it's the rest that we've already discussed.

16 (Pause)

17 THE COURT: Ms. Smallman will show it to you, and,  
18 assuming no objections, we'll send it in. And I will see you  
19 in an hour, or earlier.

20 (Pause)

21 MR. BURNETT: No objection from us.

22 MR. MILLER: No objection here.

23 THE COURT: Great. We will send that in.

24 I'm labeling the note Court Exhibit 12 because I  
25 either already have docketed, or it's on the way to the docket,



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1 an order with the earlier notes and responses and other such  
2 things. So I think we're up to 12.

3 All right. Again, I'll see you a few minutes before  
4 5:00 if we don't hear from the jury sooner. And with that, we  
5 are adjourned. Thank you.

6 (Recess pending verdict)

7 THE COURT: You may be seated.

8 As I gather you may know, we got a note, this one  
9 dated today, 4:10 p.m., signed by the foreperson, stating: "We  
10 have reached a verdict."

11 So, unless the parties have something to raise, we'll  
12 bring the jury out and we'll get a verdict.

13 (Jury present)

14 THE COURT: You may be seated.

15 We have received your most recent note, from  
16 4:10 p.m., stating that you have reached a verdict.

17 I'll ask the foreperson – I think that's you,  
18 Juror No. 1 – is that correct? Have you reached a verdict?

19 THE FOREPERSON: Yes, we have, your Honor.

20 THE COURT: Would you please hand the verdict form to  
21 Ms. Smallman so it can be passed to me.

22 THE FOREPERSON: Of course.

23 THE DEPUTY CLERK: Thank you.

24 (Pause)

25 THE COURT: I'm going to read your verdict aloud, and

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1 then I'm going to ask each of you if that is your verdict, one  
2 after the other.

3 As to Count One, which charges the defendant with wire  
4 fraud, the jury finds the defendant guilty.

5 As to Count Two, which charges the defendant with  
6 money laundering, the jury finds the defendant guilty.

7 The verdict form appears to have been signed by all 12  
8 of you, dated today, at 4:09 p.m.

9 Juror No. 1, is that your verdict?

10 JUROR: Yes, your Honor.

11 THE COURT: Juror No. 2, is that your verdict?

12 JUROR: Yes.

13 THE COURT: Juror No. 3, is that your verdict?

14 JUROR: Yes, your Honor.

15 THE COURT: Juror No. 4, is that your verdict?

16 JUROR: Yes, your Honor.

17 THE COURT: Juror No. 5, is that your verdict?

18 JUROR: Yes.

19 THE COURT: Juror No. 6, is that your verdict?

20 JUROR: Yes, your Honor.

21 THE COURT: Juror No. 7, is that your verdict?

22 JUROR: Yes, your Honor.

23 THE COURT: Juror No. 8, is that your verdict?

24 JUROR: Yes, your Honor.

25 THE COURT: Juror No. 9, is that your verdict?

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1 JUROR: Yes, your Honor.

2 THE COURT: Juror No. 10, is that your verdict?

3 JUROR: Yes, your Honor.

4 THE COURT: Juror No. 11, is that your verdict?

5 JUROR: Yes, your Honor.

6 THE COURT: And, Juror No. 12, is that your verdict?

7 JUROR: Yes, your Honor.

8 THE COURT: The jury is unanimous.

9 Counsel, is there any reason that I cannot now dismiss  
10 the jury?

11 MR. ROOS: No, your Honor.

12 MR. MILLER: No, your Honor.

13 THE COURT: All right.

14 Ladies and gentlemen, in a moment, I'm going to  
15 dismiss you, excuse you, which means that, among other things,  
16 the restrictions that you've been operating under – namely, you  
17 can't talk to anyone about the case and you can't research the  
18 case – will no longer apply. So you may do those things.

19 Let me say one thing on that score: It's up to you  
20 whether you wish to speak with anyone. This is a case that –  
21 now that I can, I will tell you – has gotten some press. So  
22 it's possible that members of the press will ask you to speak  
23 to you. It's entirely up to you whether you choose to speak to  
24 them or not. My own personal recommendation is that you not;  
25 in part, because our jury system has long been based on the

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1 notion that what happens in the jury room stays in the jury  
2 room, and, in that regard, I think there's an important reason  
3 to respect the privacy of your deliberations.

4 But it's entirely up to you. What I will ask is that  
5 if you do speak with the press or anyone about this case and  
6 your involvement in it, that you respect the privacy of your  
7 fellow jurors' deliberations and views. In that regard, what  
8 happens in the jury room should stay in the jury room, but you  
9 can speak about your own views of the case but don't speak  
10 about your colleagues' views or the deliberations. But, at the  
11 end of the day, it is up to you what you wish to do on that  
12 score.

13 Let me start by saying — my staff has heard me say  
14 this many times — there was a very famous judge in this  
15 courthouse that many of us seek to emulate in many respects, a  
16 man by the name of Edward Weinfeld, sort of a legendary figure  
17 in the law. There's one thing that he did that I disagree  
18 vehemently with and don't follow him on, which is that he did  
19 not thank jurors. It was his view that jury service is one of  
20 the few obligations that citizens in this country have, and  
21 it's an obligation of citizenship and, therefore, you don't  
22 need to be thanked. It's not my view. My view is that you  
23 guys took time out of your busy lives, devoted to us, you've  
24 been deliberating for several days, with a couple rare  
25 exceptions and not your fault, you have been here on time each

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1 day, and we have all seen how much attention and care you've  
2 given to the parties throughout the case. I think you deserve  
3 our thanks. Our system of justice depends on people like you  
4 taking time out of their busy lives to help resolve disputes  
5 and adjudicate charges like those in this case, and it's a  
6 pretty remarkable thing, I think, but it really depends on  
7 people like you taking that time.

8 So on behalf of the parties, I'm sure they would join  
9 me in thanking you, and on behalf of the court, let me say  
10 thank you for your service.

11 If you are willing to wait - I know you've been  
12 deliberating for a while at this point and probably want to get  
13 out of here, I totally respect and would understand that - if  
14 you're willing to wait for a few minutes - there are a couple  
15 matters that I will need to discuss with the parties - I'd love  
16 an opportunity to come into the jury room and thank you more  
17 personally and also answer any questions you may have about the  
18 jury process or the court system, hear any suggestions you  
19 might have about the jury process and your experiences. But  
20 it's also 4:41, I know you may want to get out of here, and I  
21 would totally understand that so would not take it personally.  
22 If you want to leave, you're welcome to leave; if you are  
23 willing to stay for a few minutes, I would love to say hi and  
24 introduce myself more personally.

25 With that, you are now formally excused from jury

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1 service, and, again, my thanks. And with my statement that if  
2 you're willing to stick around, I'll come speak to you in a few  
3 minutes, you are free to go at this time.

4 Thank you very much.

5 (Jury excused)

6 THE COURT: You may be seated.

7 All right. I will set a sentencing date for  
8 August 22nd at 2:30 p.m. In accordance with my individual  
9 rules and practices, defense submissions are due two weeks  
10 prior to sentencing, the government's submissions are due one  
11 week prior to sentencing.

12 I'll direct the government to provide its statement of  
13 the offense to probation within seven days and defense counsel  
14 must arrange for the defendant to be interviewed within the  
15 next two weeks.

16 The deadlines under the rules for any posttrial  
17 motions, if there is any request to extend those, you should  
18 confer with one another and make a request, but until I say  
19 otherwise, the deadlines are whatever the rules provide for.

20 Mr. Roos, any objection to the defendant's bail status  
21 remaining as is through sentencing?

22 MR. ROOS: No objection.

23 THE COURT: All right.

24 So, Mr. Chastain, let me advise you that the terms and  
25 conditions upon which you've been released to date will

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1 continue to apply through the date of sentencing. It is  
2 critical that you comply with them.

3 Number one, if you don't, it could affect your release  
4 status between now and sentencing.

5 And, number two, it will certainly have a bearing on  
6 the sentence that you receive in connection with your  
7 convictions today.

8 Number three, you must be here on the date and time  
9 that I set for sentencing, August 22nd, at 2:30. You should  
10 stay in touch with your lawyers because those things can  
11 change. If it changes, they'll let you know, but the bottom  
12 line is you must be here. If you're not here, then you may be  
13 subject to punishment above and beyond the punishment that you  
14 receive in connection with your convictions today.

15 Do you understand all of that?

16 THE DEFENDANT: Understood, your Honor.

17 THE COURT: All right.

18 Anything else from the government?

19 MR. ROOS: No, your Honor. Thank you.

20 THE COURT: Anything else from the defense?

21 MR. MILLER: No, your Honor. We'll confer with the  
22 government on posttrial motions.

23 Other than would we be permitted to interview the  
24 jurors, your Honor, assuming they want to talk to us?

25 THE COURT: You are permitted to try. I'm going to go

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1 see if any of them are still here. It's late in the day; I  
2 imagine they're eager to get back to their lives. I will tell  
3 them that you may be interested in talking with them.

4 Candidly, I will probably tell them that they don't  
5 need to talk to you and so they will make up their own minds,  
6 but you can certainly request in a nice way. I will also tell  
7 them if they feel harassed or otherwise pressured, that they  
8 can always reach out to me, so I trust that you won't make them  
9 feel that way.

10 All right. Thank you, again, for a well-tried case.

11 With that, we are adjourned. Thank you very much.

12 (Adjourned)